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THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

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DMR. CORP. AND
HARRILL ELECTRICAL CONTRACTORS, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

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Inc.

## QUESTION PRESENTED

Whether after finding that the National Labor Relations Board has failed to meet its burden of proof at trial, it was appropriate for the court below to allow the NLRB to reopen the administrative record on remand, thereby allowing it a second bite at the apple, absent any showing of the factors which would excuse the NLRB's failure to meet its evidentiary burden in the original hearing?

## CERTIFICATE OF INTERESTED PARTIES

Harrill Electrical Contractors, Inc.

DMR Corp.

The International Brotherhood of Electrical Workers, Local 59

The International Brotherhood of Electrical Workers, Local 116

National Labor Relations Board

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## STATUTORY PROVISIONS INVOLVED

29 U.S.C. 159(b) provides, in pertinent part, as follows:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . .

29 U.S.C. 160(e) provides, in pertinent part, as follows:

> The Board shall have power to petition any court of appeals of the United States . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order . . . . If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be made a part of the record.

## OPINION BELOW

The decision of the National Labor Relations Board is reported at 258 NLRB 1063 (1981). The decision of the United States

Court of Appeals for the Fifth Circuit, which refused to enforce the Board's decision and remanded for the introduction of new evidence, is reported at 699 F.2d 788 (5th Cir. 1983).

## JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 11, 1983. A timely petition for rehearing and a suggestion for rehearing en banc was denied on May 11, 1983, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

The International Brotherhood of Electrical Workers, Local Union 59 and Local Union 116 (hereinafter "Local 59" and "Local 116" or "Union") 1/ filed a charge with the National

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1/The Union and its locals are the only interested parties other than those listed in the case style.

Labor Relations Board (hereinafter "NLRB" or "Board") alleging that Harrill Electrical Contractors, Inc. and DMR Corporation (hereinafter "Harrill Electrical" and "DMR" or "Employers") were a single employer and had violated sections 8(a)(1) and (5) of the National Labor Relations Act (hereinafter "NLRA" or "Act") by refusing to apply the terms of an existing collective bargaining agreement between the Union and Harrill Electrical to DMR's employees and by refusing to recognize the Union as the representative of DMR's employees. The issues presented concerned whether (1) the two companies constituted a single employer and (2) if a single employer, whether the employees of the two companies constituted a single appropriate bargaining unit.

The NLRB General Counsel filed a complaint against Harrill Electrical and DMR and a hearing was held before an Administrative Law Judge (hereinafter "ALJ") on February 6-8, 1980. Near the close of that hearing, the ALJ

expressed concern that the General Counsel's evidence concerning the appropriate bargaining unit was insufficient and invited either further evidence or a stipulation. The General Counsel, however, disagreed and refused to introduce any new evidence on that issue. In addition, opposing counsel refused to stipulate the unit and the hearing ended with the record left as it was.

The ALJ subsequently found that Harrill Electrical and DMR were a single employer. Despite his expression of concern at the hearing, the ALJ also found that the employees of both companies constituted a single appropriate bargaining unit. Thus, the employers were found to have committed unfair labor practices. The Board agreed and, with minor modifications, adopted the recommended bargaining and make whole order of the ALJ.

The Board then petitioned the Court of Appeals for the Fifth Circuit for enforcement. On appeal, the Court found that there was

little, if any, evidence exclusively devoted to the appropriate unit question. Based on the record before it, the Court determined that it could not enforce the Board's order. Rather than deny enforcement outright, however, the Court remanded the case to allow the Board to reopen the record and attempt to introduce the critical missing evidence. No explanation was given by the Court to explain why the Board should be allowed such a second bite at the apple.

The Employers petitioned the Court for a rehearing and suggested a rehearing en banc solely on the issue of whether a remand or merely a denial of enforcement was appropriate when the NLRB's General Counsel, without good cause, fails to meet his burden of proof in the hearing before the ALJ. The petition was denied.

## REASONS FOR GRANTING THE WRIT

### I. Introduction and Summary of Argument

The issue raised in this petition for a writ of certiorari is a narrow one. It concerns only the decision to remand a case in order to allow the Board to reopen the administrative record to remedy deficiencies caused by the General Counsel's unexcused failure to meet its burden of proof at trial - a luxury not afforded counsel for the company (or the union) opposing General Counsel at trial.

It is a fundamental principle of American jurisprudence that, absent excuse, litigants are entitled to one and only one "full, fair and complete opportunity to litigate [an issue at trial] .... They have no right to a second bite at the apple." Nations v. Sun Oil Co., 695 F.2d 933, 938 (5th Cir. 1983); see also Huff v. N. D. Cass Co., 485 F.2d 710, 715 (5th Cir. 1973)(en banc); Price v. Haker, 411 F.2d 568 (5th Cir. 1969). This salutory principle

has been explicitly incorporated into the National Labor Relations Act in section 10(e), 29 U.S.C. § 160(e), which imposes a good cause requirement upon motions to reopen the record. In addition, courts also occasionally have recognized the one-bite rule in labor matters outside the literal scope of section 10(e). Nevertheless, for reasons unexplained, courts apparently have failed to recognize the applicability of either section 10(e) or the general policy against piecemeal litigation in the context presented by the instant case. Like the present circuit court order, they have unquestioningly remanded cases to afford the General Counsel the luxury of a second chance to meet its evidentiary burden. As a result, an unfair practice has developed. A private litigant who has failed to meet its evidentiary burden before the agency customarily must make a motion to reopen the record and demonstrate good cause for the omission of any material evidence. The General Counsel of

the NLRB, on the other hand, is perfunctorily granted a second chance to meet his burden of proof on remand without any responsibility for showing the least reason why he had not met his evidentiary burden at trial. No court has specifically analyzed this issue or justified this dichotomy in the treatment of governmental and private litigants.

The Fifth Circuit's opinion in this case reflects statutory and policy considerations which are significant and recurring. Petitioner could find no case analyzing or deciding the specific issue presented in this case. 2/ Nonetheless it is obvious that the issue of under what circumstances the NLRB is entitled to a remand when it has failed to sustain its evidentiary burden at trial is a recurring one. Petitioner suggests that in most cases, as happened here, the issue comes up only after

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2/While not exactly on point, the Seventh Circuit has denied the NLRB an opportunity

(FOOTNOTE CONTINUED ON NEXT PAGE)

the circuit courts have denied enforcement and remanded. In all probability this is the reason for the paucity of discussion on the subject of appropriateness of remand.

## II. Argument

### A. The Remand

In refusing enforcement of the decision of

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(FOOTNOTE NO. 2 CONTINUED)

to relitigate in a case in which the Board changed its mind about the applicable legal standard. Mosey Mfg. Co., Inc. v. NLRB, 701 F.2d 610, 613 (7th Cir. 1983) (en banc). See also, American Brake Shoe Co. v. NLRB, 244 F.2d 489 (7th Cir. 1957). The Court reasoned that since the Board was solely responsible for the long delay involved in the case, equity did not support a remand for reconsideration.

Cases like the instant litigation present even stronger cases for denial of remand. While it could be argued that the NLRB is entitled to discretion in determining and changing its legal holdings, it should be in no better position than private litigants and is entitled to no more consideration when it comes to its obligation to prove up its case the first time. The Mosey and American Brake Shoe reasoning applied to the instant case would seem to militate against affording the NLRB a second bite. Thus in terms of reasoning if not actual holdings, there appears to be a conflict between the Fifth and the Seventh Circuit.

the National Labor Relations Board, the Fifth Circuit found little or no evidence which would support the NLRB's "single unit" determination. NLRB v. DMR, 699 F.2d 788 (5th Cir. 1983). The Court cited its opinion in NLRB v. J. C. Penney Co., 559 F.2d 373 wherein the two standards of review for appellate courts in NLRB unit cases are set forth. In J. C. Penney, the court stated that NLRB's unit determinations are not to be overturned unless they are "arbitrary, capricous, an abuse of discretion, or lacking in substantial evidentiary support" (emphasis added). 3/

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3/ The NLRB's unit determination decision involves two distinct functions. One is the finding of facts and the other is the exercise of discretion based upon those facts. A separate standard of review applies to each function. The standard of review applicable to the first function is derived from the express command of section 10(e) of the Act that the Board's factual findings are not to be overturned "if

(FOOTNOTE CONTINUED ON NEXT PAGE)

The denial of enforcement was mandated by "the failure to place evidence in the record concerning the appropriateness of the unit ....." See, DMR, 699 F.2d at 792. The Court stated elsewhere that "there is little, if any, evidence concerning the work, skills, qualification, duties and working conditions of the Harrill and DMR electricians." Id. at 792. Such evidence is essential to any unit determination.

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(FOOTNOTE NO. 3 CONTINUED)

supported by substantial evidence on the record considered as a whole ..." 29 U.S.C. § 160(e). The standard of review applicable to the second function is derived from section 9(b) of the Act, 29 U.S.C. § 159(b), which entrusts the unit determination decision to the discretion of the Board. See Packard Motor Car v. NLRB, 330 U.S. 485, 491. In articulating the standard applicable to this latter function, the J.C. Penney court borrowed the "arbitrary" "capricious," and "an abuse of discretion" language from the prong of the Administrative Procedure Act's scope of review section generally applicable to agency discretionary decisions. See 5 U.S.C. § 706(2)(A). As will be shown, the factors affecting the decision to remand are different when enforcement is denied because of improper factual findings rather than improper discretionary judgements.

Id. at 791. The Court theorized that the failure to place evidence in the record concerning the appropriateness of the unit "seems to have resulted from an erroneous impression on the part of Counsel for the General Counsel that all he need do is establish that DMR and Harrill were the same Employer." Id. at 792. However, as the court also noted, "[i]t is well settled that a finding that two businesses are a single employer for purposes of the Act is not determinative as to whether both are bound by a union contract signed by one of them. To bind both ... requires the additional ... single appropriate bargaining unit [finding]. Id. at 791 (emphasis added), citing South Prairie Construction Co. v. Local 627, International Union of Operating Engineers, 425 U.S. 800 (1976).

B. The Appropriateness of Remand.

The two standards of review discussed above correspond to the dual nature of the

NLRB. On one hand, the Board is the quasi-judicial body charged with the impartial administration of the Act. On the other, it is a zealous advocate pursuing the interests of the charging party. This dual nature is recognized in the partial segregation of the Office of General Counsel from the rest of the NLRB. Of course, the segregation is not perfect, nor should it be. The General Counsel has the difficult job of maintaining a balance between its representation of the charging party and its duty to the general public. The latter also at times involves the exercise of the Board's expertise and discretion.

When courts examine the exercise of the discretionary functions of the NLRB under the arbitrary, capricious, or abuse of discretion standard, they are especially aware of the deference due to the Board's expertise. Thus, if they deny enforcement they generally remand the case so that the Board can properly exercise its discretion in the first instance. For example, the remand may be

for new or clarified findings of fact or conclusions of law based on the existing record. Such a remand is entirely different from the remand to reopen the record involved in this case.

When courts examine the record to ascertain whether the General Counsel has met its evidentiary burden, no issue of deference to agency expertise is involved. If anything, the General Counsel as litigant, should be held to the highest standard because of that very same expertise. At the very least, the General Counsel should be treated no better than its private adversaries. Allowing the General Counsel carte blanche to meet evidentiary burdens or not in the original factfinding process hardly constitutes deference to agency expertise. On the contrary, courts should encourage the General Counsel, like all litigants, to prove up cases at the outset. This principle is firmly supported by the law. Nevertheless, the lower courts have fallen into the practice of granting the NLRB a second chance to provide it case as a matter of course.

1. Section 10(e)

As noted before, section 10(e) of the NLRB establishes the parameters of judicial review of the NLRB's factual findings. It is that section which precludes courts from re-weighing the facts de novo. Significantly, that section goes on to state "If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its members, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record." 29 U.S.C. § 160(e) (emphasis added).

The General Counsel has been quick to apply these standards against private parties. For example, in Skaggs Pay Less Drug Stores v. NLRB, 466 F.2d 971 (9th Cir. 1972), the General

Counsel successfully argued that only "extraordinary" circumstances justified the reopening of the record on behalf of the employer. Id. at 973. No reason exists to apply a different standard to the NLRB. Indeed, the express language of section 10(e) imposes this same standard on both sides.

Admittedly the NLRB has not formally moved to have the record reopened as an alternative to its petition for enforcement. Thus, the situation before this court is outside of the literal terms of the section 10(e) restrictions on remand. In this respect, the NLRB is different from the employer in Skaggs who added such an alternative motion to its chief argument that enforcement be denied. It is impossible to say, however, why this failure of the Board to perceive any weakness in its case and to formally move, in writing or during oral argument, for a remand to reopen the record in the event enforcement be denied should place the Board in a more favorable position.

On the contrary, this failure to move to have the record reopened is an additional factor mitigating against a remand. 4/ In any case, the principles of fairness and finality which underlie section 10(e) call for the NLRB to justify the failure of the General Counsel to prove up the NLRB's case.

2. One-Bite Rule

Even apart from section 10(e), for reasons of judicial economy and fairness, courts should be reluctant to give any litigant, including the government, a second chance to vindicate its position on remand. In American Brake Shoe Co. v. NLRB, 244 F.2d 489 (7th Cir. 1957), the court refused to remand a case to allow the

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4/Indeed, it is quite possible to read section 10(e) as making a motion a prerequisite to a remand for the reopening of the record. That argument, however, goes beyond what is being argued herein and is unnecessary to the proper disposition of this case. The Employers merely contend that the absence of such a motion should not affect the decision to remand.

NLRB to pursue a new legal theory on remand when the agency's stated grounds failed. In that case, the NLRB had deliberately by-passed a viable legal theory. The court stated that to allow the NLRB to pursue it on remand "would merely give the Board another bite at the proverbial cherry, and, if such conduct were condoned piecemeal litigation would result." Id. at 494-95.

The facts in this case are even more compelling than in American Brake Shoe. In that case the General Counsel had properly pursued all available legal theories and the hearing examiner had found in the NLRB's favor. The Board adopted all but one of the examiner's theories. It expressly declined to rule on that one because it thought the others sufficed. This quasi-judicial decision is near the core of the discretionary role of the NLRB. Thus, it deserved even more deference than when the NLRB, through its General Counsel, is acting as a litigant. No issue of evenhanded treatment

of the General Counsel and the private litigant was involved in American Brake Shoe. Nevertheless, no remand was allowed.

Presumably the failure to offer sufficient evidence in this case was the negligent choice of the General Counsel rather than a deliberate decision of the Board as in American Brake Shoe. Again, however, that factor only mitigates against a remand, since clearly inadvertance is not a discretionary decision due deference by the courts.

In Mosey Manufacturing Co. v. NLRB, 701 F.2d 610 (7th Cir. 1983)(en banc), an en banc court refused to enforce a Board order because of the Board's inconsistent stance concerning the applicable legal standard. The court went on to deny remand and merely denied enforcement. In doing so the court noted the equitable nature of judicial review under section 10(e). The court found that the Board's responsibility for the long delay in the proceedings and the distance in time between the original election

and any future enforcement of a bargaining order justified the refusal to remand. The same equities dictate that no remand should be had here.

Whether one adopts the view that section 10(e) requires the General Counsel, like private parties, to justify its failure to insert crucial evidence into the record before the record can be reopened regardless of whether a formal section 10(e) motion was made or the view of the American Brake Shoe and Mosey Manufacturing courts that the principle of fairness and finality requires courts to refuse a remand in some situations, it is clear no remand is justified on the particular facts of this case. The NLRB had ample opportunity to meet its burden and simply refused or failed to do so.

The circumstances of this case are a compelling example of the unfairness and inefficiency involved in the court's failure to impose some standard for reopening the record on the General Counsel.

A review of the transcript reveals that when both sides indicated an intent to close, the ALJ raised the appropriate bargaining unit issue sua sponte. Transcript at 583-86. In response to the ALJ's inquiries, counsel for the Employers repeatedly stated that the NLRB had the burden of proving facts supporting its proposed unit determination and had failed to do so. The ALJ indicated that, based on the existing record, it was unclear whether the General Counsel had made its case. As the Fifth Circuit court noted in its decision, however, the attorney for the NLRB did not respond to these promptings from the bench and opposing counsel decided to rest his case claiming that the record was sufficient, apparently because of a confusion about the law. See DMR 699 F.2d at 792. (Transcript excerpt is set forth in Appendix A attached hereto.) No further evidence was introduced. The record remained inadequate.

Whatever the General Counsel's confusion at the original hearing may have been concerning the law, this confusion had been cleared up by the time the post-hearing brief was submitted. At page 10 of this brief the General Counsel devoted a paragraph to the unit issue. There the General Counsel recites the correct legal standard, but then submitted only conclusory allegations that the standards were met. No reference to specific evidence was made to support these conclusions. In their post-hearing brief, the Employers reiterated their objections concerning the General Counsel's failure to prove that a single unit was appropriate. Nevertheless, the ALJ found for the General Counsel on this issue. Finally, in its Exceptions and Brief in Support of Their Exceptions, the Employers tried one last time to have its argument be heard. Again, it fell on deaf ears and the NLRB adopted the ALJ's decision.

The foregoing scenario demonstrates the injustice to employers involved in second bite cases with the NLRB. The relevant evidentiary standard had been clearly established by the NLRB itself and had been reinforced by the courts prior to the hearing. If the Board's attorney was confused in this regard there simply was no excuse. The ALJ came to the General Counsel's aid when he questioned the sufficiency of the evidence on the unit issue. His admirable effort, however, was rebuffed. Counsel for the Employers utilized every means at his disposal to call the ALJ or NLRB's attention to the failure of proof, but to no avail. The NLRB, which was free to reopen the record at any time before seeking enforcement at the appellate level, simply adopted an unsupported position and refused to budge.

The NLRB instead invoked section 10(e) and petitioned the appellate court for enforcement. The employers were forced to endure the expense of

opposing that petition and the still-mounting risk of backpay liability. By the remand of this case for a reopening of the record, the agency will get all the advantages of section 10(e) with none of its corresponding burdens. There is simply no incentive for the NLRB to carefully analyze its decision whether to supplement the record or merely to go to court and gamble on enforcement. The employer, whose backpay liability continues to mount and the courts who must hear the case twice are the losers. This, the Employers respectfully submit flies in the face of the congressional intent embodied in section 10(e) and the principle of fairness recognized in American Brake Shoe and Mosey Manufacturing. It simply affords the NLRB an unfettered right to take a second bite.

Although the appellate court should not have allowed the Board to reopen the record at this time, the court theoretically could have allowed the Board to reformulate its findings

of fact and conclusions of law based on the existing record. A remand to allow this, however, would be futile. As recognized by the appellate court when it called for a reopening of the record, the existing record is fatally defective on the appropriate unit issue. While the overlap between the single employer and appropriate unit issue means that there was some evidence relevant to the unit issue, there was none exclusively devoted to the appropriate unit issue. The ALJ specifically noted this fact. The introduction of such exclusive evidence is necessary to a single unit finding. NLRB v. Big Bear Supermarket #3, 640 F.2d 924, 931 n. 7 (9th Cir. 1980). Otherwise, the conceded distinction between the single employer and appropriate unit issue will be lost.

## CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the order of the Fifth Circuit on the issue of remand.

Respectfully submitted on this ninth day of August, 1983.

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## APPENDIX A

At the hearing the following dialogue took place:

ALJ: I have a couple of questions of Counsel regarding Unit appropriateness.

Harrill doesn't dispute the appropriateness of the unit of Harrill employees comporting with the description set forth in the Complaint, does it?

MR. GASWIRTH: Let me see it. I think not -

ALJ: It would be in Paragraph 10 of the Complaint.

MR. GASWIRTH: They do not for the period of time to which work was performed at Harrill, if that answers your question.

ALJ: I am sorry. I don't understand.

MR. GASWIRTH: There was no dispute at the time that Harrill employed employees on a full time basis in the performance of work under the contract.

ALJ: So you would concede that would be an appropriate unit, if confined to Harrill?

MR. GASWIRTH: I am agreeing that it was at the time.

ALJ: Okay. Could the same be said regarding DMR?

MR. GASWIRTH: Oh, no.

ALJ: You are contending that the electricians or whatever, the unit is described in Paragraph 10, if restricted to DMR employees would not be appropriate?

MR. GASWIRTH: You are asking me if I agree that it is an appropriate unit and I am telling you that I don't agree.

ALJ: Well, what is your position on that?

MR. GASWIRTH: Well, if that becomes an issue we will General Counsel offer whatever proof and whatever proceeding they think appropriate.

ALJ: Well, I think this is an appropriate proceeding that is why I asked.

MR. GASWIRTH: I am not stipulating to that, if that is your question.

ALJ: Well, I just wanted to know--

MR. GASWIRTH: I think it is a matter of proof and I don't feel they have proved anything about it. And I'm not going to agree to it.

ALJ: All right.

MR. ALDEN: Your Honor, our position is that a unit is what is contract-ility [sic] agreed to and that is

something that is appropriate. And from our theory that these are joint employees, the DMR and Harrill Electrical are joint employees, I think the evidence in the record is that it is the same kind of work that is being performed by the same type of employees. We will rest on that.

ALJ: Well, --

MR. ALDEN: Because of the theory -- if we had not shown that there is a joint employee relationship in there then it really doesn't matter whether Paragraph 10 stands up or not.

ALJ: Well, there has not been any evidence that was exclusively addressed to the unit question. We didn't get into that, except kind of generally into job descriptions and that kind of stuff. And think the record probably suffices, but I was trying to make it easier on myself, if I could.

MR. ALDEN: I think -

MR. GASWIRTH: And unless I not be accused of guilt by silence, let me say that I don't agree with the statement that the record supports the nature of the work being the same for both companies. I think it is characterized as one and not of another.

ALJ: Well, quite possibly, I really don't know. My feeling is that the issue could be reached and disposed

of off the record. Although it might take a bit of strain. Is there anything else before we close.

MR. ALDEN: I have nothing further.

Transcript at 583-586.

APPENDIX B

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

DMR CORP. and Harrill Electric Contractors, Inc.,

Respondents.

No. 82-4094

United States Court of Appeals,
Fifth Circuit

March 11, 1983

National Labor Relations Board applied for enforcement of its order entered against two distinct business entities, which Board treated as a single employer, after Board found violations of National Labor Relations Act. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that: (1) evidence of interrelationship of operations between two distinct business entities, one of which was unionized but

virtually terminated its operations while the other was nonunion, and of common management and ownership of the two business entities was sufficient to sustain determination of Board to treat entities as a "single employer" for purposes of National Labor Relations Act, and (2) where there was little, if any, evidence concerning work, skills, qualifications, duties and working conditions of the two businesses beyond fact that both employed electricians, there was insufficient evidence in record to allow Court of Appeals to decide whether Board erred in finding that a bargaining unit of electricians employed by the two businesses was an appropriate bargaining unit for purposes of applying National Labor Relations Act, and matter would be remanded to Board for further proceedings.

Remanded.

1. Labor Relations 202

National Labor Relations Board may treat two or more distinct business entities as a "single employer" for purposes of National Labor Relations Act. National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.

2. Labor Relations 202

Criteria to which National Labor Relations Board looks in determining whether two or more distinct business entities are a "single employer" for purposes of National Labor Relations Act are interrelation of operations, common management, centralized control of labor relations, and common ownership. National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.

3. Labor Relations 202

Whether two or more distinct business entities constitute a "single employer" for

purposes of National Labor Relations Act ultimately depends on all circumstances of case and is characterized as an absence of an arm's length relationship found among unintegrated companies. National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.

4. Labor Relations 673

Determination of National Labor Relations Board that two or more distinct business entities would be treated as a "single employer" for purposes of National Labor Relations Act should be sustained if it has warrant in the record and a reasonable basis in law. National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.

5. Labor Relations 555

Evidence of interrelationship of operations between two distinct business entities, one of which was unionized but

virtually terminated its operations while the other was nonunion, and of common management and ownership of the two business entities was sufficient to sustain determination of National Labor Relations Board to treat entities as a "single employer" for purposes of National Labor Relations Act. National Labor Relations Act, 1§et seq., as amended, 29 U.S.C.A. § 151 et seq.

6. Labor Relations 262

Finding that two businesses are a single employer for purposes of National Labor Relations Act is not determinative as to whether both are bound by union contract signed by one of them; to bind both to union contract requires additional finding that employees of each constitute a single appropriate bargaining unit.

National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.

7. Labor Relations 676

Court of Appeals will not overturn National Labor Relations Board's decision as to what constitutes a single appropriate bargaining unit unless it is arbitrary and capricious. National Labor Relations Act, § 9(b), as amended, 29 U.S.C.A. § 159(b).

8. Labor Relations 731

Where there was little, if any, evidence concerning work, skills, qualifications, duties and working conditions of two distinct businesses beyond fact that both employed electricians, there was insufficient evidence in record to allow Court of Appeals to decide whether National Labor Relations Board erred in finding that a bargaining unit of electricians

employed by the two businesses was an appropriate bargaining unit for purposes of applying National Labor Relations Act, and matter would be remanded to Board for further proceedings. National Labor Relations Act, §§ 1 et seq., 9(b), as amended, 29 U.S.C.A. §§ 151 et seq., 159 (b).

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Application for Enforcement of an Order of the National Labor Relations Board.

Before BROWN, GEE and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This case is before us on the application of the National Labor Relations Board for enforcement of its order entered against Harrill Electrical Contractors, Inc. (Harrill) and DMR Corporation (DMR). The Board found that Harrill and DMR, as a

single employer, violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act), 29 U.S.C. §§ 158(a)(1) and (5), by failing to apply the terms of Harrill's collective bargaining agreements with Locals 59 and 116 of the International Brotherhood of Electrical Workers to electricians who were employed by DMR, and by failing to recognize Locals 59 and 116 as the bargaining representative of those employees.

The Board's order requires Harrill and DMR to cease and desist from the unfair labor practices so found, and in any other manner interfering with employees in the exercise of their rights under the Act. Affirmatively, the Board's order requires Harrill and DMR to make DMR employees whole for any losses they may have suffered by reason of their failure to honor the collective bargaining

agreements with Locals 59 and 116 and to recognize and bargain with Locals 59 and 116 as the collective bargaining representative of their electricians. The Board's Decision and Order is reported at 258 N.L.R.B. No. 139 (1981).

Finding that there is insufficient evidence in the record to allow this court to decide whether the Board erred in finding that a bargaining unit of electricians employed by Harrill and DMR is an appropriate bargaining unit, we remand this case to the Board for further proceedings.

I.

Harrill is a Texas corporation with its principal place of business in Mesquite, Texas. It is engaged in business as an electrical contractor. Harrill was formed in 1975, first as a proprietorship owned and managed by Randy Harrill. Since early 1977, it has existed as a corporation with

Randy Harrill as president, board chairman, manager and principal stockholder, owning a seventy-five percent interest in the company.

At all relevant times, Harrill has been party with Locals 59 and 116 to "letters of assent" binding it to the master labor agreements between those locals and certain chapters of the National Electrical Contractors Association (NECA). As concerns those electricians in its employ, Harrill has complied with its contractual obligations.

During the second half of 1978, Harrill all but ceased submitting bids on projects in the Dallas-Fort Worth area. It terminated all of its Fort Worth based electricians in November 1978 and the last of its Dallas based electricians in May 1979. Shortly before the administrative hearing in this case,

however, Harrill did acquire and begin work on some new projects.

DMR was formed and incorporated in 1978. Its principal place of business is located in Dallas, Texas, and is about a fifteen to twenty minute drive from Harrill's Mesquite location. DMR was formed by Randy Harrill and two other individuals with Randy Harrill as principal stockholder owning an eighty percent interest in the company. In 1979, Anita Harrill, Randy Harrill's wife, was made president of DMR. Randy Harrill transferred, without cost, most of his DMR shares to her, making her DMR's principal stockholder owning a sixty-five percent interest in the company. He retained ownership of a fifteen percent interest in DMR.

As president of DMR, Anita Harrill was paid sixty dollars per week. She continued to perform the clerical tasks

she had performed for Harrill. It appears that she had little to do with setting and implementing labor relations policies.

DMR is also an electrical contractor. In addition to Anita Harrill, its management consists of several individuals who had formerly worked for Harrill in much the same roles. Its financing, in the early months of its operation was primarily provided by loans from Harrill or from personal loans from Randy or Anita Harrill. DMR used trucks, tools and material that once belonged to Harrill. DMR purchased material from Harrill in transactions arranged by Randy Harrill, which may be characterized as less than "arms-length."

Randy Harrill played an important part in hiring several employees for DMR, all of whom had previously worked for Harrill. On one occasion, he also reassigned one of DMR's employees to another DMR

job.

DMR, during the relevant time period, worked on several electrical projects on which the general contractor was a construction company for whom Harrill had previously performed work. DMR also acquired an electrical service contract for two facilities whose electrical service work had previously been done by Harrill.

DMR operated as a non-union employer, and as such it did not apply the terms of the collective bargaining agreement between Harrill and Locals 59 and 116 to its electricians. Neither did it bargain with the locals over the terms and conditions of employment of its electricians.

II.

The locals filed an unfair labor practice charge against DMR and Harrill

which alleged violations of Section 8(a)(1) and (5) of the Act. In its Decision and Order, the Board found, that Harrill and DMR constitute a single employer, that an employer-wide unit of their combined electricians is the appropriate unit, and that Harrill and DMR had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Locals as the representative of DMR's electricians and by failing to apply the terms and conditions of the collective bargaining agreement to those employees.

Harrill and DMR attack the Board's order on two grounds. First, they argue that the single employer finding has no basis in law or fact. Secondly, they contend that the electricians employed by Harrill and DMR do not constitute the appropriate bargaining unit.

III.

[1-3] It is settled that the Board may treat two or more distinct business entities as a "single employer" for purposes of the Act. In such cases, the criteria to which the Board looks in determining single employer status are (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. However, no one of these factors is controlling, nor need all criteria be present. Single employer status ultimately depends on "all the circumstances of the case" and is characterized as an absence of an "arm's length relationship found among unintegrated companies." Local 627, International Union of Operating Engineers v. NLRB, 518 F.2d 1040, 1045-46 (D.C. Cir. 1975), aff'd on this issue sub nom. South Prairie

Construction Co. v. Local 627, International Union of Operating Engineers, 425 U.S. 800, 96 S.Ct. 1842, 48 L.Ed. 2d 382 (1976).

[4] Such a determination is primarily factual,and should be sustained if it "has 'warrant in the record' and a reasonable basis in the law." NLRB v. Hearst Publications, 322 U.S. 111, 131, 64 S.Ct. 851, 860, 88 L.Ed. 1170 (1944). Our examination of the record convinces us that the Board's determination meets this test.

[5] From the record facts recited earlier in this opinion, it is clear that there was an interrelationship of operations between DMR and Harrill. Additionally, there is substantial evidence of common management and ownership of Harrill and DMR. Finally, there

also exists substantial record evidence that, at least in the early stages of DMR's formation, there was centralized control over the labor relations of Harrill and DMR.

The evidence, therefore, considered as a whole, amply demonstrates that the Board's finding that Harrill and DMR constituted a single employer "has 'warrant in the record' and a reasonable basis in the law." Id.

IV.

[6] It is well settled that a finding that two businesses are a single employer for purposes of the Act is not determinative as to whether both are bound by a union contract signed by one of them. To bind both to the union contract requires the additional finding that the employees of each constitute a single

appropriate bargaining unit. South Prairie Construction Co. v. Local 627, International Union of Operating Engineers, 425 U.S. 800, 96 S.Ct. 1842, 48 L.Ed.2d 382 (1976); Florida Marble Polishers and Welfare Trust Fund v. Green, 653 F.2d 972, 975 (5th Cir. 1981).

[7] Section 9(b) of the National Labor Relations Act, 29 U.S.C. § 159(b), confers broad authority and discretion upon the Board to determine appropriate bargaining units.[1] Our power of review

1. Section 9(b) of the Act provides:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

is quite limited. We are not to overturn the Board's decision unless it is "arbitratry and capricious." Packard Motor Car Co. v. NLRB, 330 U.S. 485, 491, 67 S.Ct. 789, 793, 91 L.Ed. 1040 (1947); NLRB v. Purnell's Pride, Inc., 609 F.2d 1153, 455 (5th Cir. 1980); NLRB v. J.C. Penney Co., 559 F.2d 373, 375 (5th Cir. 1977).

In determining the appropriateness of a bargaining unit, we are concerned with the community of interests of the employees involved. Peter Kiewit Sons' Co., 231 N.L.R.B. 76, 77 (1977). Whether employees have a community of interests is determined by looking at such factors as: similarity in the scale and manner of determining earnings; similarity in employment benefits, hours of work and other terms and conditions of employment; similarity in the kind of work performed;

similarity in the qualifications, skills and training of employees; frequency of contact or interchange among employees; geographic proximity; continuity or integration of production processes; common supervision and determination of labor-relations policy; relationship to the administrative organization of the employer; history of collective bargaining; desires of the affected employees; and extent of union organization. R. Gorman, Labor Law: Unionization and Collective Bargaining 69 (1976). NLRB v. Purnell's Pride, Inc., supra.

The most reliable indicium of common interests among employees is similarity of their work, skills, qualifications, duties and working conditions. See Allied Chemical Alkali Workers of America, Local Union 1 v. Pittsburgh Plate Glass Co. v. NLRB, 404 U.S. 157, 172, 92 S.Ct. 383, 393, 30 L.Ed.2d 341 (1971). Two other reliable indicia

of common interest are centralized local control on a day-to-day basis of those labor policies which most immediately affect the interest of the employees involved and common supervision. It is these indicia which ultimately determine whether an employer-wide unit of Harrill and DMR electricians is the appropriate bargaining unit or whether DMR's electricians constitute an appropriate bargaining unit separate from Harrill's employees. Peter Kiewit Sons' Co., supra.

[8] In the record there is little, if any, evidence concerning the work, skills, qualifications, duties and working conditions of the Harrill and DMR electricians. Of course, we know that they both employ electricians, but beyond that the record is almost bare. Some evidence was introduced which would tend

to show that DMR's work is largely confined to industrial electrical projects while Harrill became a residential electrical company, In any event, we have no way of knowing if the electricians performed similar work under similar conditions and we cannot assume that they did simply from the fact that they were electricians nor from the fact that both Harrill and DMR on occasion performed work for the same general contractor. [2]

2 We recognize that the fact that though there may be a difference between the work, skills, qualifications, duties and working conditions of Harrill and DMR electricians, this still may not preclude a finding that the employer-wide unit is the appropriate unit. The issue is whether the difference is so great as to indicate that DMR's employees constitute an appropriate unit separate from Harrill's employees. Peter Kiewit Sons' Co., supra.

The fact that DMR's status as a non-union contractor was determined by Randy Harrill constitutes a "very substantial qualitative degree of centralized control of labor relations." Local 627, International Union of Operating Engineers v. NLRB, supra. However, as the Board has held, more important to the issue of whether DMR's electricians constitute an appropriate bargaining unit separate from Harrill's electricians, is whether there is local control over the DMR's day-to-day operations and whether there is separate supervision of DMR's electricians. Peter Kiewit Sons' Co., supra at 77.

It appears from the record that all the evidence concerning Randy Harrill's control over DMR's day-to-day operations and the common supervision of DMR and Harrill employees related to the initial

period of DMR's operations. After that, there may have been a change regarding control and supervision. There is simply too little, if any evidence on these important subjects for us to determine whether the Board's findings on the appropriateness of the unit are or are not arbitrary.

From our reading, the failure to place evidence in the record concerning the appropriateness of the unit seems to have resulted from an erroneous impression on the part of counsel for the General Counsel that all he need do is establish that DMR and Harrill were the same employer. Once this was established, he apparently believed that the contract between Harrill and Locals 59 and 116 would be applicable to DMR's electricians.[3] As noted above, this is not correct.

3 The following transcript excerpt seems to sum up the confusion that existed on the lack of evidence on the unit question:

We are left with a record which is undeveloped on the crucial issue of unit appropriateness. Consequently, we

(Footnote 3 continued)

> MR. ALDEN: Your Honor, our position is that a unit is what is contractility [sic] agreed to and that is something that is appropriate. And from our theory that these are joint employees, the DMR and Harrill Electrical are joint employees, I think the evidence in the record is that it is the same kind of work that is being performed by the same type of employees. We will rest on that.
>
> JUDGE BOYCE: Well,-
>
> MR. ALDEN: Because of the theory - if we had not shown that there is a joint employee relationship in there then it really doesn't matter whether Paragraph 10 [allegation that DMR and Harrill electricians constitute an appropriate unit] stands up or not.
>
> JUDGE BOYCE: Well, there has not been any evidence that was exclusively addressed to the unit question. We didn't get into that, except kind of generally into job descriptions and that kind of stuff. And think the record probably suffices, but I was trying to make it easier on myself, if I could.

are not provided with sufficient facts to make a determination of whether the Board's finding is arbitrary or not.

For the aforestated reasons, this case is remanded to the Board for the limited purpose of a new hearing, and new findings and conclusions on the sole issue of the appropriateness vel non, of the single bargaining unit of Harrill's and DMR's electricians.

REMANDED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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NO. 82-4094

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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

DMR CORP. AND HARRIL ELECTRIC CONTRACTORS, INC.,

Respondents.

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Application for Enforcement of an Order of the National Labor Relations Board

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 11, 1983, 5 Cir., 198__, _____F.2d_____).

(May 11, 1983)

Before BROWN, GEE and JULLY, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of August, 1983, three copies of the Petition for a Writ of Certiorari were mailed, postage prepaid, to the Solicitor General's Office, National Labor Relations Board, 717 Pennsylvania Avenue, Washington, D.C. 20570. I further certify that all parties required to be served have been served.

Ronald M. Gaswirth